

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 21-0033 BLA

THOMAS W. CULVER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY, LLC	)	
	)	DATE ISSUED: 11/09/2021
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Proposed Order, Supplemental Award, Fee for Legal Services of Dennis Glaze, Claims Examiner, United States Department of Labor.

Austin P. Vowels (Vowels Law PLC), Henderson, Kentucky, for Claimant.

H. Brett Stonecipher (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant's counsel (counsel), Austin P. Vowels, appeals Claims Examiner Dennis Glaze's (the district director's) Proposed Order, Supplemental Award, Fee for Legal Services rendered in connection with an attorney's fee petition filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The district director awarded benefits on May 21, 2020.

Counsel filed his initial fee petition on June 26, 2020. The district director requested he revise the fee petition to reflect billing in quarter-hour increments only. On August 4, 2020, counsel filed an amended complete, itemized fee petition requesting \$1,819.00 for legal services performed before the district director from October 8, 2019 to May 29, 2020. The total fee requested represents \$750.00 for 3.0 hours of services performed by counsel at an hourly rate of \$250.00, \$37.50 for .25 hour of services performed by a paralegal, Desire Smith, at an hourly rate of \$150.00, \$1,025.00 for 10.25<sup>1</sup> hours of services performed by a legal assistant, Sarah Agnew, at an hourly rate of \$100.00, and \$6.50 in expenses. Employer did not file any objections to the fee petition before the district director. The district director awarded attorney's fees in the amount of \$1,275.00 representing 13.5 hours of services at hourly rates of \$250.00 for counsel and \$50.00 for paralegal and legal assistant services, and denied the requested expenses.

On appeal, counsel contends the district director erred in reducing the requested hourly rates of the paralegal and legal assistant, and in disallowing the requested expenses. Employer filed a response, urging affirmance of the district director's denial of the requested expenses and his awards of the hourly rates to the paralegal and legal assistant, and asserts the district director should have further reduced certain time entries, to which counsel replied, asserting Employer's objections to the time entries were waived as they were not raised before the district director. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.<sup>2</sup>

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<sup>1</sup> Our review of the legal assistant's time totals 8.8 hours and not 10.2 or 10.25 hours, as rounded up by counsel. Fee Request at 2, 11-12.

<sup>2</sup> We affirm, as unchallenged on appeal, the district director's award of an hourly rate of \$250.00 for counsel's services. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We decline to address Employer's objections on appeal to certain time entries as they were not raised before the district director. See *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989); Employer's Brief at 4-5. Because clerical services are non-compensable, however, we did consider Employer's objections to the legal assistant's work on December 12, 2019, December 13, 2019, February 3, 2020, February 26, 2020, and May 27, 2020, as clerical. *Id.* at 5. Those objections lack merit as the services performed on those dates involved conferences with Claimant and Employer, and then summarizing those conferences, and thus did not involve clerical work. See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 666-67 (6th Cir. 2008); Amended Fee Request at 14.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.<sup>3</sup> See *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc). The regulations provide that an approved fee must take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b).

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case, and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

### **Hourly Rate**

An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); see also *Bentley*, 522 F.3d at 663. The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Counsel contends the district director erred in failing to consider all of the evidence counsel submitted to support the hourly rates of the paralegal and legal assistant, and by not explaining how he weighed that evidence. Claimant's Brief at 3-10. Counsel thus asserts the district director arbitrarily reduced the hourly rate of the paralegal and legal assistant. *Id.* We agree.

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3 at 1.

The district director summarily stated the hourly rates for counsel’s paralegal and legal assistant would be reduced from \$150.00 and \$100.00, respectively, to \$50.00 “after considering the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided.” Fee Award at 1. Further, the district director stated the “approved rate [was] comparable to that being charged by other highly qualified attorneys within the same geographical location . . . .” *Id.* Because the district director did not explain how the factors supported reducing the requested fee, and we are unable to discern his rationale, his determination does not satisfy the Administrative Procedure Act (APA).<sup>4</sup> 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with counsel’s argument that the district director did not address the evidence of prior fee awards submitted by counsel, or a survey submitted to show the appropriate market rate, prior to reducing the requested hourly rates.<sup>5</sup> As the district director did not identify this evidence or discuss the weight he accorded it, we vacate his reduction of the requested hourly rates for paralegal and legal assistant services to \$50.00 and remand this case for him to consider counsel’s evidence and to properly explain the hourly rates determined in light of the regulatory criteria.<sup>6</sup>

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<sup>4</sup> The APA requires every adjudicatory decision include “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

<sup>5</sup> In support of his requested hourly rate of \$150.00 for the paralegal, counsel submitted one opposed prior fee award from the United States Court of Appeals for the Sixth Circuit, along with three unopposed and one opposed prior fee awards from the Office of Administrative Law Judges (OALJ). Amended Fee Request at 7-8. Additionally, counsel identified several opposed and unopposed prior fee awards from the OALJ in which his paralegal was awarded \$100.00. *Id.* at 8, 9, 30. Counsel also asserts that, along with his fee petition, he submitted a prior fee award from the district director awarding an hourly rate of \$150.00 to his paralegal and \$100.00 to his legal assistant, but that document is not in the record before us. Claimant’s Brief at 5, 6. Lastly, counsel submitted the 2016 and 2018 National Utilization & Compensation Survey Reports by the National Association of Legal Assistants (NALA) to support the requested hourly rates. *Id.* at 8-9, 10.

<sup>6</sup> The district director should consider the appropriateness of the NALA reports in light of their disclaimer that they are not to be used for market purposes. 2016 NALA

## Expenses

Counsel also argues the district director erred in denying his request for expenses in the amount of \$6.50 for obtaining medical records from Deaconess Hospital. Claimant's Brief at 10-11. Counsel explains he first entered his appearance in this case on October 22, 2019, when he was hired by Claimant, and soon thereafter requested Claimant's hospital records. *Id.* Counsel further explains he was unable to review and summarize all the medical records before the deadline for their submission on November 26, 2019, and thus ended up not submitting them into the record before the district director. *Id.*

The district director found the requested expense was "not necessary in the pursuit of benefits for Claimant as there are no medical documents from Deaconess Hospital in this claim." Fee Award at 2. The district director thus denied the requested expense because it was "not reasonably necessary." *Id.*

We agree with Claimant's argument that the district director arbitrarily denied the expenses associated with obtaining hospital records in anticipation of litigation merely because the records were ultimately not submitted into the record. Claimant's Brief at 10. The proper inquiry is whether the expenses were reasonable and necessary to establish Claimant's entitlement to benefits *at the time the expenses were incurred*. See *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902 (7th Cir. 2003); *Branham v. Eastern Assoc. Coal Corp.*, 19 BLR 1-1, 1-3-4 (1994). We therefore vacate the district director's disallowance of the expense and remand for further consideration of whether it is compensable. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (Board lacks the authority to render factual findings to fill in gaps in administrative decisions). On remand, the district director must, within his discretionary authority, consider whether the expense was reasonable and necessary to establish Claimant's entitlement to benefits.

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Report at 2 n.2; 4; 2018 NALA Report at 2 n.2; 4 (both studies stating they are "specifically for market research purposes and not intended to price fix on the open market.").

Accordingly, the Proposed Order, Supplemental Award, Fee for Legal Services is affirmed in part, vacated in part, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge